Supreme Court, U.S.
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In The

Supreme Court of the United States

GORTHO, LTD.,

Petitioner,

v.

AUTO-OWNERS INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER GORTHO, LTD.'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

At least forty-seven states, the District of Columbia, and Puerto Rico have either a statute or a court rule that allows the highest court in the state to answer legal questions certified by federal courts. The purpose of a certification statute is to permit the state to make the decision itself on a state law issue when there is no law directly on point. If the state court decides that the question is trivial or unworthy of consideration, it can always turn down the certification request. In the present case, all issues before the Court of Appeals were exclusively related to Iowa state law.

The questions presented are:

1. Whether the Seventh Circuit disregarded the equal protection principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) by (a) deciding novel issues of state common law on which courts throughout the U.S. have been divided and which have not been addressed by the Iowa courts based on what the Seventh Circuit perceived to be the "correct" rule; while (b) refusing to certify the questions under Iowa law to the Iowa Supreme Court pursuant to 7th Cir. Rule 52 and §684A.1 of the Iowa Code.

2. Whether the Seventh Circuit gave insurance companies the opportunity to engage in the forum shopping condemned by *Erie,* in that insurers will normally have both diversity jurisdiction and the first choice of forum.

RULE 14.1(b) STATEMENT
PARTIES TO THE PROCEEDING

This petition involves an appeal from the United States Court of Appeals for the Seventh Circuit. The following is a list of all parties to the proceeding whose judgment is sought to be reviewed:

Gortho, Ltd., Defendant-Petitioner

Websolv Computing, Inc. d/b/a ECFirst.com, Defendant-Respondent

Uday Om Ali Pabrai, Defendant-Respondent

Auto-Owners Insurance Company, Plaintiff-Respondent

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner Gortho, Ltd., in compliance with Supreme Court Rule 29.6, certifies the following:

1. Gortho, Ltd. has no parent corporations, and

2. Gortho, Ltd., does not have any publicly held affiliates nor does any public corporation hold more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gortho, Ltd., respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The citations of the official and unofficial reports of the opinions and orders entered in this case are as follows:

The Opinion of the United States Court of Appeals for the Seventh Circuit is reprinted as Appendix B. The official citation for this opinion is *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543 (7th Cir. 2009). Rehearing, en banc, denied by *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 2009 U.S. App. LEXIS 22081 (7th Cir. Ill., Oct. 1, 2009).

The Opinion of the United States District Court for the Northern District of Illinois is reprinted as Appendix C. It is reported as *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 2007 U.S. Dist. LEXIS 65339 (N.D. Ill. 2007).

JURISDICTION

This petition involves a decision of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit entered its Opinion on September 1, 2009 and subsequently denied a petition for re-hearing on October 1, 2009. This petition was filed within 90 days of that date. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are set forth in Appendix C to this Petition: §684A.1 of the Iowa Code; 7th Cir. Rule 52.

STATEMENT OF THE CASE

Since this Court's seminal decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the federal courts must give effect to substantive state policy choices in cases such as this which arise under state law. Here, the issues of whether advertising-injury and property damage clauses of the kind in the Auto-Owners policy cover the sending of unsolicited and unauthorized fax advertisements ("junk faxes") are purely issues of state law and public policy. Because there is no Iowa decision even marginally on point, Gortho requested certification of the question to the Supreme Court of Iowa under 7th

Cir. Rule 52. Rather than certifying the question, the Seventh Circuit, in the absence of Iowa precedent, took it upon itself to follow its own opinion in *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004), which predicted that Illinois would hold that an advertising-injury clause of the kind in the Auto-Owners policy does not cover the sending of junk faxes. The Court of Appeals asserted that Iowa would follow *American States*, even though the Illinois Supreme Court had repudiated the decision as a statement of Illinois law and held that the policy provided coverage. *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 860 N.E.2d 307 (2006). Notwithstanding the Illinois Supreme Court decision in *Valley Forge*, the Seventh Circuit maintained that its interpretation was the better one and correct one, finding that, "[w]hile Iowa has no caselaw precisely on point, we conclude that it would more likely accept the interpretation that American States advances." *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 2009 U.S. App. LEXIS 19633, at 9.

With state courts divided on this issue, there is no just reason that the Iowa Supreme Court should not have been afforded the opportunity to decide the issue.

More importantly, the Seventh Circuit's approach amounts to an exercise of authority which is plainly violative of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and only serves as an inducement for insurers to continue filing cases in federal court on issues of

state law. Both the Seventh Circuit and other federal courts have noted that insurers are doing this. Furthermore, since the issues presented in most declaratory judgment actions are pure questions of law, they are not brought in the federal courts to avoid bias in fact-finding, but to obtain a resolution of legal issues different from that which the insurers believe they will obtain from the highest courts of the states.

In *Erie*, this Court rejected the reasoning of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (1842), and held that it violated equal protection to allow federal courts to impose their own "general common law" upon the states, so that litigants forced into federal courts on diversity jurisdiction got one version of state law while those in state court got another. The Seventh Circuit failed to recognize and abide by the principles outlined in *Erie*. The departure is particularly serious since insurance companies, which are repeat litigants, can and do arrange their affairs to take advantage of diversity jurisdiction. *Erie* forbids that result. Accordingly, this Court should reverse the judgment of the Court of Appeals.

A. Factual Background.

Auto-Owners Insurance Company ("Auto-Owners") is an insurance company incorporated under the laws of Michigan, with its principal place of business in Michigan. It issued a policy of liability insurance to Defendant-Appellees Uday Om Ali Pabrai ("Pabrai")

and Websolv Computing, Inc. ("Websolv"). Websolv is an Iowa corporation, with its principal place of business in Clive, Iowa. Pabrai was a citizen of Iowa.

Dr. Guy L. Bibbs brought suit in the Circuit Court of Cook County against Websolv and Pabrai under cause number 03 CH 15615, alleging that he received a "junk fax" sent by or on behalf of defendant. The complaint was brought on behalf of a class of additional similarly situated persons and alleges violations of the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"), and the Illinois Consumer Fraud Act, 815 ILCS §505/2 ("ICFA"), as well as common law conversion. Gortho, Ltd. was substituted for Bibbs in both the Circuit Court of Cook County and the District Court. Gortho, Ltd. is an Illinois corporation with its principal place of business in Illinois and Bibbs is a citizen of Illinois. On March 6, 2008, the Circuit Court certified a class on the TCPA claim which is comprised of individuals and entities included in a list of nearly 6,000 Illinois fax numbers (attached to the Amended Complaint) to which Websolv sent its advertisements. Essentially all of the class members are medical practices or practitioners.

The policy, pursuant to its Definitions section, defines certain terms as used in the Insuring Agreement (Coverages A and B), as follows:

SECTION V – DEFINITIONS

1. "Advertising injury" means injury arising out of one or more of the following offenses:

> . . . b. Oral or written publication of material that violates a person's right of privacy; . . .

12. "Property damage" means:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

B. Proceedings Below.

Auto-Owners filed an action in the Northern District of Illinois seeking a declaration as to its obligations pursuant to the policy of insurance.

The District Court declined Gortho's request that the questions be certified to the Iowa Supreme Court. Rather, subsequent to briefing of cross-motions for summary judgment in which the only "evidence" was the complaint in the underlying case and the insurance policy at issue, the District Court found a

duty to defend. Upon Auto-Owners' appeal, Gortho again requested that the question be certified to the Iowa Supreme Court. The Seventh Circuit Court of Appeals refused to certify the question and reversed the District Court. In fact, despite the Illinois Supreme Court's disagreement with the Seventh Circuit's earlier interpretation of a similar policy governed by Illinois law, the Seventh Circuit continued to insist that Iowa is more likely to agree with it than Illinois, stating that, "[w]e are now faced with this question a second time, but under Iowa law rather than Illinois law. We stand by our analysis in American States, even though Illinois has since adopted a different approach. We conclude that Iowa is more likely to adopt our interpretation rather than the one adopted by the Illinois Supreme Court." *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 2009 U.S. App. LEXIS 19633, at 15-16. The Seventh Circuit cited no Iowa case closely on point and courts throughout the U.S. are sharply divided on the substantive issues.

Gortho, Ltd. subsequently filed a petition for rehearing which was denied on October 1, 2009.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

Supreme Court Rule 10(a) provides that a factor favoring certiorari is that

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The decision below conflicts with the Eleventh Circuit in *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) and involves questions of exceptional importance in that the approach of the Seventh Circuit violates *Erie* and does so in a manner that has resulted in abuse and is likely to result in further abuse by insurance companies. Because *Erie* ended the notion of general common law, the Seventh Circuit lacks constitutional authority to prescribe common law rules for state courts and exceeded it's authority in both doing so and refusing to find coverage for Iowa insureds while failing to permit the Iowa Supreme Court to make its own determination on novel issues which have divided courts generally.

In *Erie*, the Supreme Court rejected the reasoning of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (1842), and held that it violated equal protection to allow federal courts to impose their own "general common law" upon the states, so that litigants in state courts got one version of state law while those subject to diversity jurisdiction got another. The

Seventh Circuit's decision here fails to recognize and abide by the principles outlined in *Erie*.

The Court of Appeals could have avoided the *Erie* violation and its inappropriate determination of Iowa law if it had certified the State law issues to the Iowa Supreme Court. The Court of Appeals' failure to certify is in conflict with decisions of the United States Supreme Court and other Courts of Appeals and disregards principles of federalism. The departure is particularly serious since insurance companies, which are repeat litigants, can and do arrange their affairs to always have diversity jurisdiction and can elect to file in either federal or state courts.

The Seventh Circuit has essentially created a general common law for those insurers who can sue in federal courts. Because insurers are often able to obtain diversity jurisdiction and are almost always the first party able to file a declaratory judgment action (they can prepare a demand letter and a complaint at the same time, deny coverage and file suit the same day), the Seventh Circuit has effectively precluded Iowa and other states from deciding the issue and has left the insureds in those states with no coverage and no recourse. Thus, this Court should grant certiorari and reverse the decision below.

ARGUMENT

I. THE SEVENTH CIRCUIT VIOLATED THE EQUAL PROTECTION RULE OF *ERIE R.R. CO. V. TOMPKINS* AND PRINCIPLES OF FEDERALISM, BY CREATING RULES OF COMMON LAW ON ISSUES AS TO WHICH STATE COURTS ARE DIVIDED AND AS TO WHICH THERE WAS NO RELEVANT STATE LAW, WHILE REFUSING TO CERTIFY THE QUESTIONS TO THE IOWA SUPREME COURT.

Typically, a judge applying the law of another jurisdiction can look to court decisions from that jurisdiction for guidance, but when no such guidance exists, judges are forced to put themselves in the shoes of another. Federal courts can avoid prediction of unsettled state-law questions by certifying novel questions of state law directly to the state's highest court. At least forty-seven states, the District of Columbia, and Puerto Rico have either a statute or a court rule that allows the highest court in the state to answer legal questions certified by federal courts. Some state courts have declared that they have inherent authority to answer such questions.[1] The

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[1] As the Washington Supreme Court said, "[I]t is within the inherent power of the court as the judicial body authorized by the constitution to render decisions reflecting the law of this state." *In re Elliott*, 74 Wn.2d 600, 446 P.2d 347 (1968). The Idaho Supreme Court has asserted that, barring a state constitutional provision limiting a state supreme court to the exercise of appellate jurisdiction, the ability to answer certified

(Continued on following page)

purpose of a certification statute is to permit the state to make the decision itself when there is no law directly on point and the outcome affects the state's interests. If the state court decides that the question is trivial or unworthy of consideration, it can always turn down the certification request.

In the present case, all issues before the Seventh Circuit were exclusively related to Iowa state law:

1. Whether, under Iowa law, an insurer is required to provide a defense for a "junk fax" case under an "advertising injury" provision;

2. Whether the policy should be construed from the standpoint of a lay person or from the perspective of someone familiar with "intrusion," "seclusion," and other legal concepts. The difference between the two approaches led the Seventh Circuit in *American States* to issue a prediction of Illinois law that the Illinois Supreme Court subsequently explicitly rejected in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 860 N.E.2d 307 (2006);

3. Whether Auto-Owners met the burden of showing that the exclusion in the "property damage" provision applies

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questions is an inherent aspect of a state supreme court's original jurisdiction. *Sunshine Mining Co. v. Allendale Mutual Insurance Co.*, 105 Idaho 133, 666 P.2d 1144 (1983).

> when the policy contains a "separation of insureds" clause and Auto-Owners failed to present any evidence of who sent the faxes, what he thought, or what the person's position within the company is.

These are issues purely of state law and ones on which the state courts have been sharply divided.[2] Consequently, there was no just reason that the Iowa Supreme Court should not have been afforded the opportunity to agree with those states finding coverage and protect its insureds. More importantly, the Seventh Circuit's approach amounts to an exercise of authority which is violative of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and only serves as an inducement for insurers to continue filing cases in federal court on novel issues of state law.

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[2] On the first and second questions compare *Eclipse Manuf. Co. v. U.S. Compliance Co.*, 381 Ill. App. 3d 127, 886 N.E.2d 349 (2nd Dist. 2007); *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795, 803, 905 N.E.2d 976 (1st Dist. 2009); *Motorists Mut. Insurance Co. v. Dandy-Jim, Inc.*, 2009 Ohio 2270 (Ohio. Ct. App. 2009); *Myron Corp. v. Atlantic Mut. Insurance Corp.*, 407 N.J. Super. 302, 970 A.2d 1083 (App. Div. 2009); *Schuetz v. State Farm Fire & Cas. Co.*, 147 Ohio Misc. 2d 22 (Ohio C.P. 2007); *Telecom. Network Design, Inc. v. Bretheren Mutual Insurance Co.*, 83 Pa. D. & C.4th 265 (Pa. C.P. 2006); *Terra Nova Insurance Co. v. Fray-Witzer*, 449 Mass. 406, 869 N.E.2d 565 (2007); *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App. 2004) with *ACS Systems, Inc. v. St. Paul Fire & Marine Insurance Co.*, 147 Cal. App. 4th 137, 53 Cal. Rptr. 3d 376 (2nd Dist. 2007); *Farm Bureau Mut. Insurance Co. v. Graphics House Sports, Inc.*, 2008 Mich. App. LEXIS 1281 (Mich. Ct. App., June 17, 2008).

Rather than allowing Iowa to determine Iowa law, the Court of Appeals made its own determination as to whether coverage should exist, barely addressing Iowa law. In doing so, the Court of Appeals has deprived Iowa of the opportunity to decide the issue one way or another.

This Court has frequently praised the certification procedure as a shining example of cooperative federalism and judicial economy. In *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974), the Court noted that certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." Similarly, in *Bellotti v. Baird,* 428 U.S. 132, 151 (1976), the Court commented that the presence of a certification procedure allows the federal courts to avoid ruling on the constitutionality of an abortion restriction until the state courts have delineated the nature of that restriction:

> The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis.

The federal District Courts and Courts of Appeals have been increasingly relying upon certification to ascertain uncertain state law. A 1994 American Judicature Society study of all federal circuit court

appellate decisions published since 1990 showed the importance of the certification process to the federal appellate courts. For example, the study revealed that the federal Court of Appeals for the Eleventh Circuit granted 90% of the certification applications it received. By comparison, the federal Court of Appeals for the Tenth Circuit, which granted the lowest percentage of such applications, nevertheless granted more than a third of the certification applications submitted to it (34%).[3]

Here, §684A.1 of the Iowa Code, makes clear that the Iowa Supreme Court has authority to respond, providing specifically that the:

> supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of another state, when requested by the certifying court, if there are involved in a proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state.

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[3] Goldschmidt, J., *Results of A National Survey of Federal Judges and State Supreme Court Justices Regarding Certification of Questions of Law, American Judicature Society*, Nov. 1994.

Further, Seventh Circuit Rule 52 provides that:

> (a) When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision on the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

In fact, nearly the exact same insurance policy issue was certified to the Florida State Supreme Court by the 11th Circuit because no Florida law exists on this issue. *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) Gortho similarly requested certification of the question to the Supreme Court of Iowa under 7th Cir. Rule 52. The Seventh Circuit declined the request and instead chose to follow its own opinion in *American States Insurance Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004), which incorrectly predicted that Illinois would hold that an advertising-injury clause of the kind in Auto-Owners' policy does not cover the sending of junk faxes, by asserting that Iowa would follow it.

The Seventh Circuit's only justification for its refusal to certify the question is that the issue is not likely to recur. Yet the *American States* issue had already recurred in *Valley Forge* and this case, as the Seventh Circuit recognized, was also a recurrence of *American States*. Furthermore, as set forth below, there are numerous legal issues that are in fact quite likely to repeat themselves in this and other contexts, and the Seventh Circuit decision only invites their inappropriate presentation to federal courts.

II. RATHER THAN APPLY IOWA LAW, THE SEVENTH CIRCUIT CREATED ITS OWN COMMON LAW ON IMPORTANT AND RECURRING STATE LEGAL ISSUES.

The coverage issue in this instance was a question of whether, under Iowa law, the insurance policy issued to Websolv required Auto-Owners to provide it with a defense in the litigation that it faced in Cook County, Illinois. This coverage lawsuit was initiated by Auto-Owners and filed in the Northern District of Illinois subsequent to the Seventh Circuit's decision in *American States* but prior to the Illinois Supreme Court's decision in *Valley Forge*. Until the Illinois Supreme Court's ruling was issued, Auto-Owners itself relied exclusively on the *American States* case in moving for summary judgment on the duty to defend. Conversely, Gortho maintained, as it has throughout, that the law of Iowa applies.

The Illinois Supreme Court issued its opinion in *Valley Forge* on November 30, 2006. Therein, it explicitly disagreed with the Seventh Circuit's prediction announced in *American States* and found that insurance companies are required to provide a defense under such policies. Auto-Owners quickly renounced its reliance on *American States* and agreed that Iowa law controls. Gortho had and continued to request certification of the question at hand to the Iowa Supreme Court, both in the District Court and the Seventh Circuit Court of Appeals, but the Seventh Circuit refused and chose instead to take on the issue itself.

Since this Court's decision in *Erie* that federal courts in nonfederal matters are required to follow state law rather than "general common law," the federal courts have often been faced with the difficult problem of ascertaining state law when there is no controlling state statute or definitive judicial decision on the matter. In violation of *Erie*, the Court of Appeals imposed general common law on state law issues in this case. The Court of Appeals simply looked back to its own decision in *American States* where it was called upon, not to form its own opinion, but to decide what an Illinois court would do on the issue of insurance coverage for TCPA claims under *Illinois* law and held that a general liability carrier is not required to defend against such claims.

Plainly, the decision in *American States* was *not* correct as a prediction of Illinois law. *American States* was abrogated by the Illinois Supreme Court in *Valley*

Forge, *supra*, in which the Illinois high court, construing an "advertising injury" clause like the one at issue here, expressly declined to follow the Seventh Circuit's interpretation of Illinois law and found that TCPA claims were indeed covered under the policy. The Illinois court reasoned that the Seventh Circuit's reliance "on the proposition that 'publication' matters in a 'secrecy situation,' but not in a 'seclusion situation' as a basis for interpreting the insurance policy language" was inconsistent with the Illinois court's approach of construing undefined insurance policy terms by their lay meaning. *Id.* at 323. Notwithstanding the Illinois Supreme Court decision in *Valley Forge* which expressly repudiates *American States*, the Seventh Circuit maintained that its interpretation was the better one and correct one, finding that, "[w]hile Iowa has no caselaw precisely on point, we conclude that it would more likely accept the interpretation that American States advances." *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 2009 U.S. App. LEXIS 19633, at 9.

Accordingly, instead of following the Eleventh Circuit's approach in *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008), the Seventh Circuit has made a significant decision regarding Iowa law for which there is no caselaw directly on point and conflicts with principles of federalism recognized by the Eleventh Circuit and other Courts of Appeals.

III. THE COURT OF APPEALS' "PREDICTIONS" OF IOWA LAW COULD HAVE LONG-REACHING IMPACT.

A. Whether, in Interpreting Provisions Such as the Advertising Injury Clause of an Insurance Policy, a Reader of the Policy Is Charged With Technical, Legal Understanding.

A fundamental disagreement in this case, *American States* and *Valley Forge* was whether the policy should have been construed from the standpoint of a layperson, to whom technical or legal characterizations such as "intrusion on seclusion" have no meaning, or a lawyer with expertise in defamation law. This difference in approach is not limited to fax cases. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.,* 154 Ill. 2d 90, 108, 607 N.E.2d 1204, 1212 (1992) (pollution claim); *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 609 S.E.2d 895, 911-12 (2004) (non-junk fax privacy claim).

In this case, the Seventh Circuit again was called upon to make a prediction as to what a state (now Iowa) would decide with respect to a similar policy. The Seventh Court decided that Iowa is more likely to agree with its *American States* opinion than *Valley Forge* because its view was "better," stating that,

> [w]e are now faced with this question a second time, but under Iowa law rather than Illinois law. We stand by our analysis in American States, even though Illinois has since adopted a different approach. We

> conclude that Iowa is more likely to adopt our interpretation rather than the one adopted by the Illinois Supreme Court.

Auto-Owners Ins. Co. v. Websolv Computing, Inc., 2009 U.S. App. LEXIS 19633, at 15-16.

However, as this Court stated in *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941), *Erie* commands that a federal court "must determine what the state law is, not what it ought to be."

The Court of Appeals' failure to adhere to this mandate is clear by the fact that it reached this conclusion not by analyzing Iowa law, of which it only cites one or two tangential cases, but by restating its *own* view of what the outcome *should* be and reiterating its earlier incorrect prognostication of Illinois law. This is nothing less than "the general law of the country – which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on the particular subject . . . " *Erie*, 304 U.S. 64, 78 (1938).

In urging its own interpretation first presented in *American States*, the Court of Appeals failed to give effect to Iowa case law in violation of *Erie* by reading significant state cases regarding interpretation of insurance policies so narrowly as to deprive them of their meaning. Iowa caselaw can only be seen as requiring a similar result in this case as that reached by the Illinois Supreme Court in *Valley Forge*. This can be seen by the fact that Illinois and Iowa follow the same approach in interpreting insurance policies.

American Home Assur. Co. v. McLeod USA, Inc., first compared Iowa and Illinois law and held that "Iowa and Illinois courts use almost identical methods to interpret insurance policies." 475 F.Supp.2d 766, 770 (N.D. Ill. 2007). In light of similarities between Iowa and Illinois law, the court concluded that the Iowa Supreme Court would interpret the "advertising injury" provision to cover TCPA junk-fax suits, just as the Illinois Supreme Court has.

> In light of *Valley Forge*, the similarities between Iowa and Illinois policy interpretation rules, and the approach of the vast majority of courts that have looked at this issue, the Court is not persuaded that the Iowa Supreme Court would follow *American States* as the Insurers suggest. Rather, the Court believes it would apply *Valley Forge*. Therefore, regardless of whether Illinois or Iowa law applies, the Insurers have a duty to defend and McLeod is entitled to summary judgment.

McLeod, 475 F.Supp.2d 766, 770-72.

There is nothing showing that Iowa would depart from the key principle of Illinois insurance law underlying the decision in *Valley Forge*, that undefined terms are given "their plain, ordinary, and popular meanings." (*McLeod*, 475 F.Supp.2d 766, 770). This is what led the Illinois Supreme Court and *McLeod* to the conclusion that "publication" meant communication or "announcing to the public," that "material" was broad enough to include advertisements, and that "right of privacy" connoted both

an interest in seclusion and an interest in secrecy of personal information. (*McLeod*, 475 F.Supp.2d 766, 770-72).

Indeed, Iowa is more pro-insured than Illinois law. Under Iowa law, "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Empire Mutual Cas. Co. v. Rinderknecht Assocs.*, No. 6-532/05-1057, 2007 Iowa App. LEXIS 17 (Jan. 18, 2007). Illinois does not go so far.

Despite this, and having acknowledged that "[i]t is true that Iowa, like Illinois, gives undefined words in an insurance contract their ordinary meaning." *Auto-Owners* at 16, *citing A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 618 (Iowa 1991), the Seventh Circuit insisted on creating its own insurance law, concluding, in essence, that it was correct and Iowa would agree with its findings in *American States*. In so finding, the Seventh Circuit relied on *one* Iowa decision for the proposition that "Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions." *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). However, that still does not answer the key question of whether the reader of the associated policy language is assumed to understand technical legal concepts such as intrusion or seclusion.

B. The Meaning of the Separation of Insureds Clause.

Another state law issue likely to recur (completely distinct from coverage under "advertising injury") is whether the separation of insureds clause requires a defense under the property damage coverage for such a claim. Such clauses are present in most general and professional liability policies. The Seventh Circuit panel stated that "Gortho's complaint in the underlying case alleges that Websolv sent the fax." *Auto-Owners* at 20. Of course, the entity did not send the fax; some human being whose actions are imputed to it did.

The problem with the Seventh Circuit's analysis is that the test for coverage under a property damage policy with a separation of insureds clause is not the same as the test for liability in the underlying matter. Thus, if an employee intends or expects damage, that intent is imputable to his employer for liability purposes in the underlying case, but is not imputable to deprive the company of insurance coverage unless the policy specifically provides that the intent of "any" insured is sufficient to trigger the exclusion. *American Fam. Mut. Ins. Co. v. Enright*, *infra*. Where, as here, the policy requires that the insured seeking coverage intends or expects harm, no imputation is authorized. *American Fam. Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108, 115-17 (Iowa 2005) (discussing the difference between two types of "separation of insureds" provisions, and approving the holding of a Colorado case that "unlike the phrase

'the insured,' the phrase 'any insured' unambiguously expresses a contractual intent to prohibit recovery by an innocent co-insured"). Under policies containing "separation of insureds" clauses (or "innocent partners" clauses in legal malpractice policies), whether harm was intended or expected must be determined *separately* for the company and whatever natural person committed the conduct complained of, without imputation. *American Fam. Mut. Ins. Co. v. Enright*, 334 Ill. App. 3d 1026, 31-34, 781 N.E.2d 394, 399-401 (2nd Dist. 2002). The entire purpose of a "separation of insureds" clause is "to provide each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the liability limits of the policy." *Utica Mut. Ins. Co. v. Emmco Ins. Co.*, 309 Minn. 21, 243 N.W.2d 134 (1976). Where there are multiple insureds, then the separation-of-insureds clause requires that the determination of an occurrence and the application of any exclusion be made separately for each insured from the viewpoint of each insured, even if the act or intent of one would be imputed to the other for purposes of the underlying lawsuit. *Cf. Alaska v. Houston Cas. Co.*, 797 P.2d 1200, 1204 (Alaska 1990). In fact, as the Illinois Appellate Court recently held, it cannot be resolved at the declaratory judgment stage whether the insured intentionally or negligently sent unsolicited fax advertisements to the class, finding that "[i]t is possible under the complaint that Shelborne was negligent in believing the subject fax advertisements were authorized and did not intend to convert the recipients' paper and toner or dispossess them of their

fax machines. Thus, it is possible that the property damage was an occurrence that was not expected or intended. Therefore, ICH has a duty to defend Shelborne in the underlying action." *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795, 905 N.E.2d 976, 984-98 (1st Dist. 2009).

Courts generally are split on the issue. While some focus on the employee's intentional conduct, others look to the employer's negligence in hiring, training and supervision. *King v. Dallas Fire Insurance Co.*, 85 S.W.3d 185 (Tex. 2002).

The Seventh Circuit altogether failed to acknowledge the argument, as recognized by the Iowa Supreme Court, numerous other courts and as even *it* previously recognized in *Chicago Housing Authority v. Federal Security, Inc.*, 161 F.3d 485 (7th Cir. 1998), that an act may be intentional and malicious from the standpoint of the human being performing the act, but wholly fortuitous and unintended from the standpoint of the entity sought to be held liable. Rather, the Seventh Circuit, with an offhand conclusion, and no discussion of Iowa law, waded into important issues of state law and policy. There is no reason why a company should not be able to insure against errant behavior by an employee that creates TCPA liability for it, just like it can insure against reckless or intentionally wrongful use of its vehicles or firearms (*Federal Security*), or perverse sexual acts by an employee (*Enright*).

Plainly, the Seventh Circuit has a view as to whether the policy provisions at issue provide coverage for TCPA claims. But the Seventh Circuit's view is not at issue and is not the proper basis for a finding of non-coverage. The question is not what a federal court feels the outcome ought to be. Rather, the question is what the relevant state court would do. Here, it would be most reasonable to assume that Iowa, which caselaw shows to be more pro-insured than Illinois, would find that there is a duty to defend. Regardless, it is improper and violative of *Erie* for a federal court to impose its own view, which is contrary to the weight of authority, rather than permitting Iowa to decide the issue on its own.

IV. THE SEVENTH CIRCUIT CREATED A MECHANISM PARTICULARLY SUITED TO ABUSE, AND WHICH HAS BEEN ABUSED, BY INSURANCE COMPANIES AND OTHER REPEAT LITIGANTS.

One of the main purposes of *Erie* was "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). *Hanna* viewed *Erie* as a reaction to the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Hanna*, 380 U.S. at 467. *See Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928) (diversity jurisdiction existed although plaintiff was reincorporated solely to create diversity); *see also*

O'Brien v. Avco Corp., 425 F.2d 1030, 1036 (2d Cir. 1969) (administrator was appointed to secure a federal forum because of alleged prejudice in state court; federal court viewed appointment "as a blatant example of precisely the type of forum-shopping that [the anticollusion statute] and cases like *Erie R.R. Co. v. Tompkins* . . . were designed to prevent").

The Seventh Circuit, by finding that there is no relevant Iowa law and then setting forth its own law, has effectively prevented Iowa from deciding the issue and invited insurers to continue to file these types of cases in federal forums in order to gain the advantage of such precedent and has accomplished just what this Court has long sought to curtail.

This forum shopping problem is particularly problematic in insurance cases, which involve a class of professional litigants who are able to arrange their affairs so that they can almost always create diversity jurisdiction. Insurers are often able to obtain diversity jurisdiction and are almost always the first party able to file a declaratory judgment action (they can prepare a demand letter and a complaint at the same time, deny coverage and file suit the same day). The primary purpose of the diversity statute is to avoid prejudice against corporate outsiders in fact finding, not to prevent state high courts from determining state law. *Ho v. Ikon Office Solutions, Inc.*, 143 F.Supp.2d 1163 (N.D. Cal. 2001). The Seventh Circuit in fact itself recognized in *American States* that, "[a]lmost all litigation of this kind has proceeded in federal district court." *American States*

at 943. The reason is that insurers can create diversity at will, and the Seventh Circuit's willingness to substitute its view of the "better" result for the result a state court would reach invites the forum shopping which *Erie* condemned as violative of equal protection.

Courts and commentators have noted this strategy. A 1996 article states, "[i]nsurance companies and other large companies have consistently preferred the treatment of the federal courts and have relied on diversity jurisdiction to be heard in the forum of their choice." Everette, April N., *Survey of Developments in North Carolina and the Fourth Circuit: United States Fidelity and Guaranty Co. v. A&S Manufacturing Co.: Realignment of Parties in Diversity Jurisdiction Case,* 74 N.C.L. Rev. 1979.[4] The Seventh Circuit has even noted this preference, pointing out that "[t]here is a paucity of [state] law directly on point . . . (Perhaps this is a price of the apparent preference on the part of the insurance companies for litigating in federal court when diversity of citizenship is present.)" *Advanced Ground*

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[4] *See also* Frankfurter, Felix & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System*, New York: MacMillan, at 94-96 (1928) (describing the House supporting limits on removal jurisdiction that the Senate opposed, in part because the federal courts were understood as preferable fora for corporate actors); Purcell, Jr., Edward A., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America*, New York: Oxford University Press, 1992.

Systems Engineering, Inc. v. RTW Industries, Inc., 388 F.3d 1036, 1040 (7th Cir. 2004).

This is a misuse of diversity jurisdiction. Declaratory actions generally present pure questions of law and public policy, to be determined by comparing the policy with the claims in the underlying action. Under *Erie*, the legislature or high court of each state is entitled to formulate its rules of insurance law. The use of diversity jurisdiction to allow certain federal courts to substitute their view of what the law should be for the state high court's determination of what it is violates *Erie* and should be stopped forthwith. This Court should hold that if certification is permissible, there should be a strong presumption in favor of certification of pure questions of law unless the legal issues are well settled by the state courts and no reasonable argument for a change in the law can be made. If the state court does not feel that it is necessary to get involved, it can decline to do so, but it should be given that opportunity absent clear precedent dictating the result.

This is necessary because insurers clearly *are* manipulating jurisdiction in order to take advantage of the Seventh Circuit's "general common law." For instance, in late 2006, subsequent to the *Valley Forge* decision by the Illinois Supreme Court, CNA (which is the same insurer as in the *Valley Forge* case) filed a declaratory action in the Northern District of Illinois naming only the insured and not the claimant, as required by Illinois law. The alleged basis of federal subject matter jurisdiction was

diversity of citizenship. Joining the claimant in the federal action would destroy diversity of citizenship and deprive the federal court of subject matter jurisdiction and filing with all necessary parties would require the insurer to file in state court, but CNA continued to argue that the matter should proceed in federal court, resulting in duplicative lawsuits. In the interim, the claimant filed a proper case in the state court naming all necessary parties but CNA continued to argue that the matter should proceed in federal court. *Record-A-Hit, Inc. v. Nat'l Fire Ins. Co.*, 377 Ill. App. 3d 642, 880 N.E.2d 205 (1st Dist. 2007); *Nat'l Fire Ins. Co. v. Tri-State Hose & Fitting, Inc.* 06 C 5256, 2007 U.S. Dist. LEXIS 45685 (N.D. Ill., June 21, 2007). Similarly, the court in *Federal Insurance Co. v. Mazer*, 2009 U.S. Dist. 23257 (W.D. Ohio, March 11, 2009), found it plain that the insurer's filing a case in federal court after it had been served with complaint filed by the insured in state court was an effort at federal forum shopping.

In fact, the *American States* opinion is likely the reason that this matter was filed in federal court. Auto-Owners initially moved for summary judgment in the District Court relying exclusively on *American States*.

The Seventh Circuit admitted that the issue is outcome determinative but found that it "is hardly one of vital public concern" and is "not likely to recur" because the insurance industry in 2005 began issuing a standard endorsement specifically excluding coverage for TCPA claims. While it is true that insurers

have begun to include such endorsements, it is simply not true that this ends the advertising injury coverage question. Numerous insurers continue to use policies that do not include such endorsements. Cases involving TCPA insurance issues are common.[5]

Moreover, these basic state law insurance issues are not confined to unsolicited fax cases. For instance, *American States* has already been cited outside the context of TCPA cases. *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 609 S.E.2d 895, 911-12 (2004) (application of privacy provision in non-TCPA context). The issue of whether a policy should be construed from the

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[5] *ACS Systems, Inc. v. St. Paul Fire & Marine Insurance Co.*, 147 Cal. App. 4th 137, 53 Cal. Rptr. 3d 376 (2nd Dist. 2007); *American Home Assurance Co. v. McLeod USA, Inc.*, 475 F.Supp.2d 766 (N.D. Ill. 2007); *Cynosure, Inc. v. St. Paul Fire & Marine Insurance Co.*, 2009 U.S. Dist. LEXIS 31454 (D. Mass., Apr. 8, 2009); *Eclipse Manuf. Co. v. U.S. Compliance Co.*, 381 Ill. App. 3d 127, 886 N.E.2d 349 (2nd Dist. 2007); *Farm Bureau Mut. Insurance Co. v. Graphics House Sports, Inc.*, 2008 Mich. App. LEXIS 1281 (Mich. Ct. App., June 17, 2008); *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795, 905 N.E.2d 976 (1st Dist. 2009); *Motorists Mut. Insurance Co. v. Dandy-Jim, Inc.*, 2009 Ohio 2270 (Ohio Ct. App. 2009); *Myron Corp. v. Atlantic Mut. Insurance Corp.*, 407 N.J. Super. 302, 970 A.2d 1083 (App. Div. 2009); *Schuetz v. State Farm Fire and Cas. Co.*, 147 Ohio Misc. 2d 22, 890 N.E.2d 374 (Ohio C.P. 2007); *St. Paul Fire and Marine Insurance Co. v. Brother Intern. Corp.*, 319 Fed. Appx. 121 (3d Cir. N.J. 2009); *St. Paul Fire and Marine Insurance Co. v. Onvia, Inc.*, 2007 U.S. Dist. LEXIS 11650 (W.D. Wash., Feb. 16, 2007); *Telecom. Network Design, Inc. v. Bretheren Mutual Insurance Co.*, 83 Pa. D. & C.4th 265 (Pa. C.P. 2006); *Terra Nova Insurance Co. v. Fray-Witzer*, 449 Mass. 406, 869 N.E.2d 565 (2007).

standpoint of a lay insured or an expert arises frequently in non-junk fax contexts. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 108, 607 N.E.2d 1204, 1212 (1992) (pollution claim); *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 609 S.E.2d 895, 911-12 (2004) (non-junk fax privacy claim).

The separation of insureds clause is very common and the issue arises in most coverage cases involving vicarious liability of an employer for acts of an agent which can be characterized as intentional. It arises in any case where an entity is sought to be held liable for intentional torts of employees. Most cases involve sex abuse, civil rights violations and allegedly justified use of force. *See e.g. Chicago Housing Authority v. Federal Security, Inc.*, 161 F.3d 485 (7th Cir. 1998); *American Fam. Mut. Ins. Co. v. Enright*, 334 Ill. App. 3d 1026, 31-34, 781 N.E.2d 394, 399-401 (2nd Dist. 2002).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted to review the Opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3286

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v.

WEBSOLV COMPUTING, INCORPORATED,
doing business as ECFIRST.COM,
UDAY OM ALI PABRAI, and GORTHO, LIMITED,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 C 2092 – Charles R. Norgle, Sr., Judge.

ARGUED SEPTEMBER 3, 2008 –
DECIDED SEPTEMBER 1, 2009.

Before EASTERBROOK, Chief Judge, and CUDAHY and SYKES, Circuit Judges.

SYKES, Circuit Judge. This insurance-coverage dispute involves the interpretation of an "advertising injury" clause in a commercial general liability policy. Websolv Computing, Inc., was sued in Illinois state court for sending an unsolicited fax advertisement to

a dental office. Websolv tendered the defense of this suit to its insurer, Auto-Owners Insurance Company, which accepted it under a reservation of rights. Auto-Owners then filed this action in federal court seeking a declaratory judgment that it had no duty to defend Websolv in the underlying Illinois suit. The district court applied Illinois law and held that Websolv's policy with Auto-Owners covered the claim. We reverse. Iowa law – not Illinois law – applies here. Under Iowa law the insurance policy does not require Auto-Owners to defend Websolv in the underlying suit.

I. Background

In September 2003 Guy Bibbs sued Websolv in Illinois state court for sending an unsolicited one-page fax advertisement to his dental office. Bibbs claimed, among other things, that Websolv violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.[1] The fax at issue was an advertisement for seminars to train health-care professionals how to comply with the terms of the Health Insurance Portability and Accountability Act. The parties later agreed to substitute Gortho, Ltd., Bibbs's dental practice, as the plaintiff, and the state court dismissed with prejudice all claims related to Bibbs. Websolv was insured by Auto-Owners under a

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[1] Bibbs also sued Uday Om Ali Pabrai and John Does 1 through 10. Bibbs alleged violations of the TCPA and the Illinois Consumer Fraud Act, 815 ILL. COMP. STAT. § 505/2, as well as claims for common-law conversion and "property damage."

commercial general liability ("CGL") policy and tendered its defense to the insurer. Auto-Owners accepted the tender, appointed counsel, and reserved its right to argue that it had no duty to defend Websolv under the terms of the policy.

Auto-Owners then filed this action in federal court seeking a declaration that it had no duty to defend Websolv. The parties agreed that Iowa law should control and filed cross-motions for summary judgment. Despite the parties' stipulation to Iowa law, the district court concluded that Illinois law governed. It granted Websolv's motion for summary judgment, holding that under Illinois law the insurance contract required Auto-Owners to defend the type of claims at issue here. It based its decision on the Illinois Supreme Court's opinion in *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307 (Ill. 2006), which held that "advertising injury" policy language like that at issue here covered TCPA claims. Auto-Owners appealed, arguing that (1) the district court erred by applying Illinois law rather than Iowa law; and (2) Auto-Owners is entitled to summary judgment under Iowa law.

II. Discussion

A. Choice of Law

We begin by addressing the district court's decision to apply Illinois law rather than Iowa law to this dispute. We review a district court's choice-of-law

decision de novo. *Gramercy Mills, Inc. v. Wolens*, 63 F.3d 569, 572 (7th Cir. 1995). The parties expressly agreed in the district court that Iowa law applied, but the district court applied Illinois law for two reasons. First, the judge believed he was required to apply the substantive law of the forum state. This was incorrect. Second, the judge believed he could ignore the stipulation of the parties because neither party had briefed the court on the substance of Iowa law. This, too, was incorrect.

First, and most importantly, the parties agreed that Iowa law should control their dispute. We honor reasonable choice-of-law stipulations in contract cases regardless of whether such stipulations were made formally or informally, in writing or orally. *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982). "Courts do not worry about conflict of laws unless the parties disagree on which state's law applies." *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 427 (7th Cir. 1991). "[I]t is the exceptional circumstance that a federal court, or any court for that matter, will not honor a choice of law stipulation." *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1120 (7th Cir. 1998). Here, Auto-Owners filed its motion for summary judgment without explicitly making a choice-of-law argument. Websolv immediately moved to certify questions of state law to the Iowa Supreme Court, arguing that "the present matter [calls] for application of Iowa law." In its response Auto-Owners agreed that Iowa law should apply and also noted that the parties had "explicitly agreed in open court

. . . that Iowa substantive law applies in this case." This plainly amounts to a stipulation by the parties that Iowa law controls their dispute.

Indeed, Websolv has never objected to the application of Iowa law – either in the district court or on appeal. In its brief on appeal, Websolv explicitly stated it "does not disagree that Iowa law governs." Rather, Websolv has argued that Iowa courts would adopt the same interpretation of the policy language as the Illinois Supreme Court did in *Valley Forge*. This is an argument over the content, not the applicability, of Iowa law. Because the parties agreed that Iowa law should govern and because the choice of Iowa law is entirely reasonable, the district court should not have applied Illinois law.

The district court also was mistaken in its belief that it had to apply the substantive law of the forum state. When a federal court hears a case in diversity, it does not necessarily apply the substantive law of the forum state; rather, it applies the choice-of-law rules of the forum state to determine which state's substantive law applies. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Illinois, the forum state, applies the "most significant contacts" test to choice-of-law disputes. *Westchester Fire Ins. Co. v. G. Heileman Brewing Co.*, 747 N.E.2d 955, 961 (Ill. App. Ct. 2001). In insurance-coverage cases, Illinois considers a variety of factors to determine which state's substantive law should apply, including the domicile of the insured, the place of delivery of the policy, and the place of performance. *Id.* Illinois

places the most importance on the location of the insured risk. *Mass. Bay Ins. Co.*, 136 F.3d at 1122. All of these factors point to Iowa in this case: The insurance policy was delivered to Websolv, an Iowa corporation, at its Iowa headquarters through an Iowa agency, and the risk is located in that state. Under Illinois choice-of-law principles, Iowa substantive law clearly applies.

Finally, the district court believed it could apply Illinois law because neither party had briefed the court on the substance of Iowa law. The court cited *Employers Mutual Casualty Co. v. Skoutaris*, 453 F.3d 915 (7th Cir. 2006), to support this determination. That case, however, simply notes that the default rule that the law of the forum state applies when neither party suggests otherwise. *Id.* at 923 ("[W]e apply the law of the forum state . . . since neither party has challenged the district court's choice of law."). Here, by contrast, the parties specifically agreed that Iowa law, not Illinois law, should apply.

In any event, the parties *did* brief the court on the substance of Iowa law. After agreeing that Iowa law applied, Auto-Owners specifically requested permission to file a supplemental memorandum in support of its motion for summary judgment addressing the substance of Iowa law. Instead of granting Auto-Owners' motion, the district court instructed the briefing to continue as scheduled. In its response to Auto-Owners' summary-judgment motion, Websolv explained that there was no controlling Iowa law but argued that Iowa shared the same basic contract

principles as Illinois, which had a decision – *Valley Forge* – directly on point. Auto-Owners then filed a reply discussing why Iowa contract-law principles would lead Iowa to a different result from that reached in Illinois.[2]

B. Does the Insurance Policy Cover Gortho's Claims?

Our next question is whether, under Iowa law, the terms of the CGL policy require Auto-Owners to defend Websolv against Gortho's claims. Gortho's primary claim against Websolv is that it violated the TCPA by faxing an unsolicited, one-page advertisement to Gortho. The TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an

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[2] Websolv makes a related argument that Auto-Owners failed to show that Iowa law differed from Illinois law in any material respect. It cites Illinois cases purportedly standing for the rule that Illinois courts presume the law of the governing jurisdiction is the same as Illinois unless the party shows a material difference between the two. The cases Websolv cites, however, appear to be based on waiver; in those cases the parties did not cite to *any* authority from the purportedly applicable jurisdiction. Here, on the other hand, the parties agreed that there is no Iowa case directly on point. Without recourse to specific Iowa caselaw, Auto-Owners argued from general principles of Iowa insurance law (for which it cited to Iowa cases), as well as caselaw from other jurisdictions. We do not think Illinois requires any more from litigants. *See Sterling Fin. Mgmt. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 902 (Ill. App. Ct. 2002) (assuming that a conflict exists when the law of the applicable jurisdiction is unresolved or unclear).

unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). It also permits persons or entities to sue in state court for violations of the TCPA and to recover between $500 and $1,500 in damages for each violation. *Id.* Websolv argues that Auto-Owners is required to defend it from Gortho's claims under two separate provisions in the policy – the "advertising injury" provision and the "property damage" provision.

1. "Advertising Injury" Coverage

The insurance policy specifically requires Auto-Owners to defend against suits alleging "'advertising injury' caused by an offense committed in the course of advertising [the insured's] goods, products or services." The contract then defines "advertising injury" as follows:

> "Advertising injury" means injury arising out of one or more of the following offenses:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan.

Websolv contends that the language in subsection (b) triggers Auto-Owners' duty to defend the TCPA claim. In response Auto-Owners claims that the right of privacy referred to in subsection (b) only covers secrecy-based privacy interests rather than seclusion-based privacy interests and that a TCPA suit asserts an invasion of a seclusion-based interest. While Iowa has no caselaw precisely on point,[3] we conclude that it would more likely accept the interpretation that Auto-Owners advances.

The insurance policy does not define the "right of privacy," and that phrase can have multiple meanings and refer to a variety of rights. The *Restatement (Second) of Torts* identifies four ways in which one's right of privacy can be invaded: (1) unreasonable intrusion upon another's seclusion; (2) appropriation of another's name or likeness; (3) unreasonable

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[3] Because Iowa has no pertinent caselaw on this question, Gortho asks us to certify this issue to the Iowa Supreme Court. Certification is appropriate only when "'the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to [decide] . . . the issue.'" *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) (quoting *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998)). While the issue is certainly outcome-determinative, it is hardly one of vital public concern. Furthermore, the issue is not likely to recur. As both parties acknowledge, the insurance industry in 2005 began issuing a standard endorsement specifically excluding coverage for TCPA claims. As this issue only arises in cases involving insurance contracts issued before 2005, it is not worthy of certification.

publicity given to another's private life; and (4) publicity that places another in a false light. § 652A(2). We have previously organized these rights into two broad categories – rights involving secrecy interests and rights involving seclusion interests. *Am. States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 941 (7th Cir. 2004) ("The two principal meanings [of privacy] are secrecy and seclusion, each of which has multiple shadings."). Secrecy interests involve the right to keep certain information confidential; seclusion interests involve the right to be left alone. For example, "[a] person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion." *Id.*

The underlying suit here only involves seclusion interests. Gortho does not contend that Websolv's fax advertisement revealed secret or proprietary information about it; rather, it alleges that the unsolicited fax intruded on its right to be left alone.[4] Therefore, the question in this case is whether the "advertising

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[4] Gortho, as a corporation, does not have any common-law seclusion rights. *See* RESTATEMENT (SECOND) OF TORTS § 652I cmt. c ("A corporation, partnership or unincorporated association has no personal right of privacy. It has therefore no cause of action for any of the four forms of invasion covered by [§ 652B]."). Any seclusion interests it asserts derive from the TCPA, not common law.

injury" coverage in the CGL policy requires Auto-Owners to defend Websolv in a suit claiming an infringement of Gortho's seclusion interests.

As we have noted, Iowa has no precedent on this exact question.[5] Instead, the parties offer only general principles of insurance-contract interpretation culled from Iowa cases, which are too generic to be of much help. However, this is not the first time that we have been asked to interpret this particular policy language without the benefit of a state high-court decision on point. In *American States Insurance Co. v. Capital Associates,* we were faced with this same "advertising injury" question under Illinois law. 392 F.3d 939. At the time, Illinois had no relevant decisions interpreting this sort of provision, and we had to predict how the Illinois Supreme Court would decide the question. We concluded that the advertising-injury provision did not cover claims arising under the TCPA for two reasons. First, we noted that businesses generally do not enjoy a common-law right to seclusion, making it unlikely that the "right to privacy" provision in a corporate insurance policy was meant to cover seclusion

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[5] In 2007 a district court in this circuit attempted to answer this question under Iowa law and concluded that the advertising-injury provision covered TCPA claims. *Am. Home Assurance Co. v. McLeod USA, Inc.,* 475 F. Supp. 2d 766 (N.D. Ill. 2007). It rested its conclusion on the fact that Illinois had recently adopted this interpretation and predicted that Iowa would too. *Id.* at 772. We disagree for the reasons we explain in the text.

interests. *Id.* at 942. Second, we reasoned that the use of the word "publication" in the provision made it more probable that the provision only covered claims involving secrecy interests. As we noted, "[i]n a secrecy situation, publication matters; otherwise secrecy is maintained. In a seclusion situation, publication is irrelevant." *Id.* We concluded that the insurer had no duty to defend against seclusion-type claims under Illinois law. *Id.* at 943.

Two years later, the Illinois Supreme Court had the opportunity to decide the issue. It disagreed with our analysis in *American States* and held instead that under Illinois law advertising-injury policy provisions cover TCPA claims. *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307 (Ill. 2006). Specifically, the court disagreed that the word "publication" narrowed the scope of "privacy rights" to only those related to secrecy. The court interpreted "publication" to mean nothing more than "communication." *Id.* at 316-17. "By faxing advertisements to the proposed class of fax recipients as alleged in [the] complaint, Swiderski published the advertisements . . . in the general sense of communicating information to the public. . . ." *Id.* at 317. The Illinois Supreme Court disavowed our conclusion to the contrary, stating that our interpretation of the provision was inconsistent with Illinois' policy of giving undefined contract terms their plain and ordinary meanings. *Id.* at 322-23.

We are now faced with this question a second time, but under Iowa law rather than Illinois law. We stand by our analysis in *American States*, even

though Illinois has since adopted a different approach. We conclude that Iowa is more likely to adopt our interpretation rather than the one adopted by the Illinois Supreme Court. It is true that Iowa, like Illinois, gives undefined words in an insurance contract their ordinary meaning. *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 618 (Iowa 1991). However, Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions. *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). We continue to read the policy's use of the word "publication" in the advertising-injury definition to narrow the scope of the "privacy rights" referred to in the same clause. The provision provides coverage for "oral or written publication of material that violates a person's right of privacy." The most natural reading of this language is that it covers claims arising when the insured publicizes some secret or personal information – not claims arising when the insured disrupts another's seclusion.

"Publication" is implicated only where the relevant concern is secrecy; one can violate another's right to seclusion without publicizing anything. *See, e.g., Doe v. Mills*, 536 N.W.2d 824, 832 (Mich. Ct. App. 1995) ("An action for intrusion upon seclusion focuses on the *manner* in which information is obtained, not its *publication;* it is considered analogous to a trespass.") (emphasis added); RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) ("The intrusion itself makes the defendant subject to liability, even though

there is no publication. . . ."). One who knocks repeatedly on another's door late at night or takes photographs of another from across the street may violate the person's seclusion rights even though no "publication" has occurred. We think it stretches the advertising-injury language too far to interpret "publication" to include the type of activity at issue in this case. The TCPA protects seclusion interests irrespective of publication, but the "publication" language in subsection (b) of the policy's definition of "advertising injury" strongly suggests that this coverage only applies to alleged invasions of secrecy interests.

The other subsections of the definition of "advertising injury" also support this interpretation. The other three provisions of the advertising-injury definition focus on harm arising from the *content* of an advertisement rather than harm arising from mere *receipt* of an advertisement. The surrounding provisions cover advertising-injury claims for libel, slander, misappropriation, and copyright infringement – all of which require the examination of the content of the offending advertisement.[6] It is

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[6] Auto-Owners also argues that the phrase "right of privacy" refers only to Iowa's state-law tort of invasion of privacy and does not include violations of federal law like the TCPA, which protects similar interests. As support it argues that the surrounding provisions all refer to specific state-law torts. Given our conclusion, we need not address this alternative argument. We note, however, that subsection (d) refers to copyright infringement, which arises under federal law rather than state

(Continued on following page)

therefore reasonable to infer that subsection (b) also concerns harm emanating from the content of an advertisement; that is, it is reasonable to read subsection (b) to refer only to violations of secrecy interests. Here, Gortho is not complaining about the content of the fax; rather, it complains that the very fact the fax was sent violated the corporation's right to be left alone under the TCPA. Accordingly, we conclude that the advertising-injury provision does not cover claims brought under the TCPA.

2. Property-Damage Provision

Under the CGL policy, Auto-Owners also has a duty to defend its insured against claims arising from property damage, defined as "physical injury to tangible property." However, the policy specifically excludes property damage that is expected or intended from the standpoint of the insured. Websolv argues that Gortho's claim is a claim for property damage because the unsolicited fax advertisement used ink and paper from Gortho's fax machine. While it is true that the one-page fax advertisement consumed a small amount of ink and one sheet of paper from Gortho's machine, this consequence was both expected and intended by Websolv. Because the policy expressly excludes damage that is expected or intended by the insured, Auto-Owners has no duty to

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common law. Therefore, it is not unreasonable to assume that the phrase "right of privacy" encompasses rights arising under federal law as well as state tort law.

defend Websolv under this provision. *See Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 639 (4th Cir. 2005) ("It is obvious to anyone familiar with a modern office that receipt is a 'natural or probable consequence' of sending a fax, and receipt alone [results in] . . . depletion of the recipient's time, toner and paper. . . ."); *Am. States Ins. Co.*, 392 F.3d at 943 ("[J]unk faxes use up the recipients' ink and paper, but senders anticipate that consequence.").

Websolv attempts to evade this fairly obvious conclusion by arguing that the policy's "separation of insureds" provision requires us to evaluate the property damage from the perspective of the company separately from the perspective of the employee who actually sent the fax. In other words, Websolv contends that while the fax-sending employee may have intended to use up Gortho's toner and paper, Websolv itself intended no such thing, and therefore it did not expect or intend the resulting property damage. The primary problem with this argument is that Gortho's complaint in the underlying case alleges that Websolv sent the fax and that Pabrai (the individual defendant in the case) merely "authorized and approved" it. Accordingly, the "separation of insureds" provision does not help Websolv.

For the foregoing reasons, we REVERSE the decision of the district court and REMAND with instructions to enter summary judgment in favor of Auto-Owners.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AUTO-OWNERS INSURANCE CO., Plaintiff, v. WEBSOLV COMPUTING, INC., UDAY OM ALI PABRI, GUY BIBBS, Defendants.	Case No. 06 C 2092 HONORABLE CHARLES R. NORGLE (Filed Aug. 31, 2007)

OPINION AND ORDER

CHARLES R. NORGLE, District Judge.

Before the court are the parties' cross motions for summary judgment. For the following reasons, Defendant's Motion for Summary Judgment is granted, and Plaintiff's Motion for Summary Judgment is denied.

I. BACKGROUND

A. Facts

This declaratory judgment action arises out of a lawsuit filed by Guy Bibbs ("Bibbs") against Defendant Websolv Computing, Inc. ("Websolv"), Uday Om Ali Pabri ("Pabri"), and John Does 1-10 in the Circuit Court of Cook County, Illinois. On February 21, 2004, Bibbs alleges that he received an unsolicited one-page

fax advertisement from Websolv. Bibbs alleges that he had no prior relationship with the Defendants, and had not authorized the sending of this fax.

In response to this fax, on September 18, 2003, Bibbs filed a lawsuit in the Circuit Court of Cook County, Illinois, against Websolv, Uday Om Ali Pabri ("Pabri"), and John Does 1-10, alleging that this fax was in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Websolv and Pabrai tendered their defenses in the state case to Auto-Owners Insurance Co. ("Auto-Owners"), who has agreed to defend both Websolv and Pabrai under a full reservation of rights.

The insurance policy Auto-Owners issued to Websolv contains several clauses relevant to this lawsuit. They are listed below:

SECTION 1-COVERAGES

Coverage A. Bodily Injury and Property Damage Liability

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result.

Coverage B. Personal and Advertising Injury Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this coverage part applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result.

SECTION V-DEFINITIONS

1. "Advertising injury" means injury arising out of one or more of the following offenses:

b. Oral or written publication of material that violates a person's right of privacy.

B. Procedural History

On September 18, 2003, Bibbs filed his state action in the Circuit Court of Cook County, Illinois. Then, on April 13, 2006, Auto-Owners filed this Declaratory Judgment case in the Northern District of Illinois, requesting this court find that Auto-Owners has no duty to defend Websolv in the underlying state court case. On October 23, 2006, Auto-Owners filed its Motion for Summary Judgment. On February 28, 2007, Bibbs filed his

cross-motion for summary judgment, as well as his Response to Auto-Owner's motion. Then, on April 9, 2007, Auto-Owners filed its Reply to its motion for summary judgment, and its Response to Bibb's motion. Bibbs filed his Reply on April 23, 2007. The cross-motions for summary judgment are fully briefed and before the court.

II. DISCUSSION

A. Standard of Review

Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, *see Heft v. Moore,* 351 F.3d 278, 283 (7th Cir. 2003), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Szymanski v. Rite-Way Lawn Maintenance Co.,* 231 F.3d 360, 364 (7th Cir. 2000); *see also Vukadinovich v. Bd. of Sch. Tr.'s of North Newton School,* 278 F.3d 693, 699 (7th Cir. 2002).

In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See Stinnett v. Iron Works Gym/Executive Health Spa, Inc.,* 301 F.3d 610, 613 (7th Cir. 2002). The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See* FED. R. CIV. P. 56(c); *see*

also Koszola v. Bd. of Educ. of City of Chicago, 385 F.3d 1104, 1108 (7th Cir. 2004), "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *See United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962); *see also First Nat'l Bank of Ariz. v. Cities Service Co.,* 391 U.S. 253, 280 (1968); *Spiegla v. Hall,* 371 F.3d 928, 935 (7th Cir. 2004). The choice between reasonable inferences from facts is a jury function. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

When a party moves for summary judgment, the court must view the record and all inferences in a light most favorable to the non-moving party, *Ameritech Benefit Plan Comm. v. Communication Workers of Am.,* 220 F.3d 814, 821 (7th Cir. 2000). However, the inferences construed in the non-moving party's favor must be drawn from specific facts identified in the record that support that party's position. *See Szymanski,* 231 F.3d at 364. Under this standard, "[c]onclusory allegations alone cannot defeat a motion for summary judgment." *Thomas v. Christ Hospital and Medical Center,* 328 F.3d 890, 892-93 (7th Cir. 2003) (citing *Lujan v. Nat'l Wildlife Federation,* 497 U.S. 871, 888-89 (1990)).

B. Duty of Insured to Defend under Illinois Law

1. The American States case

In January 2005, the Seventh Circuit issued its decision in *American States Insurance Co. v. Capital*

Associates, Inc., 392 F.3d 939 (7th Cir. 2005). There, Defendant Capital Associates, Inc. ("Capital") sent an unsolicited advertisement via fax to JC Hauling Company ("JC"). As a result, JC field a class action complaint in the Illinois State Court, alleging that the fax sent by Capital violated the TCPA. Capital tendered the defense to American States Insurance Co, ("American States"), which had issued an insurance policy covering, among other things, "advertising injury." Under the insurance policy, "advertising injury" includes "oral or written publication of material that violates a person's right of privacy."

American States filed a federal suit seeking a declaratory judgment that the insurance policy does not call for either defense or indemnity. Specifically, American States alleged that the transmission of unsolicited faxes does not cause "advertising injury." *See id.*, at 940. The District Court held that an unsolicited fax invades the recipient's "privacy" and that American States must defend Capital. *Id.*

The Seventh Circuit reversed, relying on both Illinois law and Seventh Circuit precedence, and held that "an advertising-injury clause of the kind in American States' policy does not cover the normal consequences of junk advertising faxes." *Id.* at 943. The court found that the question at hand was "not how the word 'privacy' was used in the debates that led to § 227(b)(1)(C), or in its implementing regulations, but what the word means in the insurance policy." *American States,* 392 F.3d at 942. The court found that "the structure of the policy strongly

implies that coverage is limited to secrecy interests." *Id.* The court went on to say that "§ 227(b)(1)(C) condemns a particular means of communicating an advertisement, rather than the contents of that advertisement-while an advertising-injury coverage deals with informational content." *Id.* The court also pointed out that they did not cite "any Illinois cases interpreting the scope of 'privacy' coverage under an advertising-injury clause . . . because Illinois has not issued any pertinent decision at any level (trial or appellate)." *Id.* At the time the Seventh Circuit issued its opinion in *American States,* the Illinois Supreme Court did rule on the issue of whether an insurer must defend an insured in a TCPA claim pursuant to an "advertising injury" clause in an insurance policy. However, as explained below, the current law in Illinois now requires insurers to defend an insured under such a policy. The Seventh Circuit did not have the benefit of the Illinois Supreme Court case at the time it ruled in *American States.*

2. *The Illinois Supreme Court's decision in Valley Forge*

Almost two years after the Seventh Circuit issued *American States,* the Illinois Supreme Court issued its decision in *Valley Forge Ins. Co. v. Swiderski Electronics. Inc.,* 223 Ill.2d 352 (Ill. 2006). In that case, Defendant Swiderski Electronics, Inc. ("Swiderski") sent Ernie Rizzo, a private investigator and owner of Illinois Special Investigations, a fax advertisement in regards to the sale, rental, and

service of various types of electronic equipment. Shortly thereafter, Rizzo filed a complaint in the circuit court of McHenry County, Illinois, alleging that Swiderski violated the TCPA when it faxed Rizzo unsolicited advertisements.

Swiderski tendered the defenses of Rizzo's lawsuit to its insurer, Valley Forge Insurance Company ("Valley Forge"). Pursuant to the terms of the insurance policy, Valley Forge had a duty to defend Swiderski against any suit that sought damages caused by "personal and advertising injury." The insurance policy provided that "personal and advertising injury" included injury that "arises out of one or more of the following offenses: . . . [O]ral or written publication, in any manner, of material that violates a person's right to privacy." *Valley Forge Ins. Co.*, 223 Ill.2d at 356. The trial court entered judgment in favor of Swiderski, and the appellate court affirmed. Specifically, the court found that, according to Illinois' rules of insurance-policy construction, that the "insurers owed Swiderski a duty to defend pursuant to the 'advertising injury' provision of the policy." *Id.*

The Illinois Supreme Court affirmed, and found that "based on the plain, ordinary, and popular meaning of the words [advertising injury], we believe this type of injury falls potentially within the coverage of the policies' "advertising injury" provision." *Id.* at 367. The court went on to say that the "policies do not define the terms 'publication,' 'material,' or 'right of privacy,' which is why we must afford them their plain, ordinary, and popular

meanings." *Id.* Additionally, the court found that "the language of the 'advertising injury' provision is sufficiently broad to encompass the conduct alleged in the complaint." *Id.* The court felt that to "adopt the insurer's proposed interpretation of [the policy], i.e., that it is only applicable where the content of the published materials reveals private information . . . would require [the court] to rewrite the phrase "material that violates a person's right to privacy" to read 'material *the content of which* violates a person *other than the recipient's* right of privacy.'" *Id.*

C. This Court Must Follow Illinois Law

It is well established that a federal court sitting in diversity "applies the substantive law of the sate in which the district resides." *River East Plaza, L.L.C. v. The Variable Annuity Life Ins. Co.*, ___ F.3d ___, 2007 WL 2377383, *2 (7th Cir. Aug. 22, 2007) (citing *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938)). Therefore, because the Illinois Supreme Court has ruled that an insurer has a duty to defend the insured in a TCPA case, under the "advertisement injury" clause in an insurance policy, Auto-Owners must defend Websolv in the underlying state case. It is this court's duty "to apply state substantive law, as we believe the highest court of the state would apply it." *Pisciotta v. Old Nat'l Bancorp,* ___ F.3d ___, 2007 WL 2389770, *4 (7th Cir. Aug. 23, 2007).

Furthermore, the court notes that the parties have previously agreed that Iowa law controls this

issue. However, neither party has briefed the issue as to how the Iowa Supreme Court would rule on the issue of an insurer's duty to defend in a TCPA case under an "advertising injury" clause. Nor has either party shown that Iowa law could differ from Illinois law on this issue. When neither party "challenges . . . the choice of law" the court will "apply the law of the forum state." *Employers Mut. Cas. Co. v. Skoutaris,* 453 F.3d 915, 923 (7th Cir. 2006). Therefore, under *Erie,* the court will follow the established law in Illinois in regards to "advertising injury" clauses in insurance policies, as laid out in *Valley Forge.*

As a result, because the Illinois Supreme Court has held that an insurer has a duty to defend the insured in a TCPA case under an "advertising injury" clause, no reasonable jury could find for Auto-Owners in this declaratory judgment action. Therefore, summary judgment must be granted in favor of Websolv.

III. CONCLUSION

For the foregoing reasons, the court grants Defendant's Motion for Summary Judgment, and denies Plaintiff's Motion for Summary Judgment.

IT IS SO ORDERED.

ENTER:

/s/ Charles R. Norgle
CHARLES R. NORGLE, Judge
United States District Court

DATED: 8/31/07

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*
RICHARD D. CUDAHY, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

No. 07-3286

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v.

WEBSOLV COMPUTING, INCORPORATED, doing business as ECFIRST.COM, UDAY OM ALI PABRAI, and GORTHO, LIMITED,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 2092

Charles R. Norgle, Sr., *Judge.*

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that

the petition for rehearing and for rehearing en banc is DENIED.

APPENDIX D

* * * CURRENT THROUGH CHANGES RECEIVED DECEMBER 21, 2009 * * *

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT TITLE VII. GENERAL PROVISIONS

USCS Ct App 7th Cir, Circuit R 52

Review Court Orders which may amend this Rule.

Circuit Rule 52. Certification of Questions of State Law

(a) When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

(b) If the state court decides the certified issue, then within 21 days after the issuance of its opinion the parties must file in this court statements of their positions about what action this court should take to complete the resolution of the appeal.

APPENDIX E

* * * THIS DOCUMENT IS CURRENT THROUGH THE 2008 SUPPLEMENT (2008 LEGISLATION) * * *
* * * ANNOTATIONS CURRENT THROUGH SEPTEMBER 10, 2009 * * *

TITLE XV. JUDICIAL BRANCH AND JUDICIAL PROCEDURES
SUBTITLE 5. SPECIAL ACTIONS
CHAPTER 684A. QUESTIONS OF LAW IN SUPREME COURT CERTIFIED

Iowa Code § 684A.1 (2008)

684A.1 Power to answer.

The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of another state, when requested by the certifying court, if there are involved in a proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the appellate courts of this state.

No. 09-814

IN THE

Supreme Court of the United States

GORTHO, LTD.,

Petitioner,

v.

AUTO-OWNERS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT MARC CHEMERS
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QUESTIONS PRESENTED

I. Whether Petitioner has failed to present a compelling reason to grant the Petition, where the Seventh Circuit Court of Appeals acted within its sound discretion and denied Petitioner's request to certify an insurance coverage question to the Iowa Supreme Court in the absence of controlling Iowa precedent, and where the Seventh Circuit predicted how the Iowa Supreme Court would rule on the coverage issue, in accordance with this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

II. Whether Petitioner has failed to present a compelling reason to grant the Petition, where the impact of the Seventh Circuit's Opinion is limited to insurance coverage disputes filed in the Seventh Circuit which concern claims brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227, and which involve the application of Iowa law.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Auto-Owners Insurance Company is a Michigan corporation. Respondent's parent corporation is Auto-Owners Insurance Group, which is also a Michigan corporation. No publicly held company owns more than 10% or more of Auto-Owners Insurance Group's stock.

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STATEMENT OF THE CASE

Respondent submits this Statement of the Case to address any misstatement of fact or law in the Petition for Writ of *Certiorari* that bears on what issues properly would be before the Court if *certiorari* were granted.

On April 14, 2006, Auto-Owners filed a declaratory judgment action in the United States District Court for the Northern District of Illinois, seeking a declaration that it owed no duty to defend or indemnify its insureds Websolv Computing, Inc. ("Websolv") and Uday Om Ali Pabrai ("Pabrai"), against Cause No. 03 CH 15615, filed against Websolv and Pabrai in the Circuit Court of Cook County, Illinois. The underlying suit alleged that on February 21, 2003, Guy Bibbs ("Bibbs"), a dentist, received an unsolicited and unauthorized fax advertisement from Websolv and Pabrai regarding HIPAA compliance and training seminars (R. Doc. 1 at Ex. 2). Bibbs brought the action on behalf of a class of more than 50 additional similarly-situated persons and alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), common law conversion, violations of the Illinois Consumer Fraud Act, 815 ILCS § 505/2, and "property damage" (R. Doc. 1 at Ex. 2).

Websolv is an Iowa corporation, with its principal place of business in Clive, Iowa. (R. Doc. 1, p. 2). Pabrai is a citizen of the State of Illinois, who resides in Aurora, Illinois (R. Doc. 1, p. 3). Bibbs is a citizen of the State of Illinois (Doc. 1, p. 4). Gortho, Ltd. ("Gortho"), Bibbs' professional corporation, later substituted in for Bibbs in the underlying suit, because the fax machine at issue was owned by Gortho (R. Doc. 40-1, Ex. 1 at 2-3).

On November 1, 2006, Bibbs filed a "Motion to Certify Question of Iowa Law to Iowa Supreme Court," arguing that "the present matter relates to a policy issued in Iowa to an Iowa company, thus calling for application of *Iowa* law" (R. Doc. 20-1, p. 4; emphasis in original). Auto-Owners filed a response, agreeing that Iowa substantive law controlled the interpretation of the policy, but disputing that the case was appropriate for certification to the Iowa Supreme Court (R. Doc. 23-1).

On February 7, 2007, the District Court denied Bibbs' motion to certify, holding that "the fundamental issue the court must decide in the pending summary judgment motion will deal with basic contract law," and that "[t]he court is not persuaded that because counsel have found no law in the Iowa state court that speaks directly to whether an insurer has a duty to insure a policy holidy [sic] for violations of the TCPA, that this is enough to justify a certification to the Iowa Supreme Court." (R. Doc. 27-1).

On August 31, 2007, after the parties filed cross-motions for summary judgment, the District Court issued a memorandum opinion denying Auto-Owners' motion for summary judgment and granting Defendants' motion for summary judgment (Doc. 52-1; Doc. 53-1; A.1-8). The District Court concluded that Illinois law governed despite the parties' stipulation that Iowa law applied (Doc. 53-1; A.1-8). Auto-Owners appealed.

The United States Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and

remanded the matter with instructions to enter summary judgment in favor of Auto-Owners. *Auto-Owners Insurance Co. v. Websolv*, 580 F.3d 543, 552 (7th Cir. 2009).

On appeal, Gortho asked the Circuit Court to certify the coverage question to the Iowa Supreme Court because there was no pertinent Iowa caselaw on the question whether a commercial general liability (CGL) insurance policy covers alleged violations of the TCPA. *Websolv*, 580 F.3d at 549, n3. The Court rejected Gortho's request for certification, stating:

> "Certification is appropriate only when '"the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to [decide] . . . the issue."' *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) (quoting *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998)). While the issue is certainly outcome-determinative, it is hardly one of vital public concern. Furthermore, the issue is not likely to recur. As both parties acknowledge, the insurance industry in 2005 began issuing a standard endorsement specifically excluding coverage for TCPA claims. As this issue only arises in cases involving insurance contracts issued before 2005, it is not worthy of certification." *Websolv*, 580 F.3d at 549, n3.

The Seventh Circuit further observed that while there was no Iowa precedent on the exact question whether the "advertising injury" coverage in the CGL policy required Auto-Owners to defend Websolv in a suit claiming an infringement of Gortho's seclusion interests derived from the TCPA, it faced the same "advertising injury" question under Illinois law in *American States Ins. Co. v. Capital Associates*, 392 F.3d 939 (7th Cir. 2004), which held that under Illinois law, the insurer had no duty to defend against seclusion-type claims. *Websolv*, 580 F.3d at 550, citing *American States*, 392 F.3d at 943. The Seventh Circuit noted that subsequent to its decision in *American States*, the Supreme Court of Illinois decided *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307 (Ill. 2006), which held that in Illinois, advertising-injury policy provisions cover claims brought under the TCPA. *Websolv*, 580 F.3d at 550.

Even though Illinois had since taken a different approach, the Seventh Circuit concluded that Iowa was "more likely to adopt [its] interpretation rather than the one adopted by the Illinois Supreme Court [in *Valley Forge*]." *Websolv*, 580 F.3d at 550. In so holding, the Court reasoned:

> "It is true that Iowa, like Illinois, gives undefined words in an insurance contract their ordinary meaning. *A.Y. McDonald Indus., Inc. v. Ins. Co. of North America*, 475 N.W.2d 607, 618 (Iowa 1991). However, Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions. *Kibbee v. State*

> *Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). We continue to read the policy's use of the word 'publication' in the advertising-injury definition to narrow the scope of the 'privacy rights' referred to in the same clause. The provision provides coverage for 'oral or written publication of material that violates a person's right of privacy.' The most natural reading of this language is that it covers claims arising when the insured publicizes some secret or personal information—not claims arising when the insured disrupts another's seclusion." *Websolv*, 580 F.3d at 550.

Thereafter, the Seventh Circuit addressed Websolv's assertion that Gortho's claims amounted to claims for property damage and triggered coverage where the unsolicited fax advertisement used ink and paper from Gortho's fax machine. The Court held that while the one-page fax advertisement used a small amount of ink and one sheet of paper from Gortho's machine, such damage was excluded from coverage because it was both expected and intended by Websolv, and the policy excludes damage that is expected or intended by the insured. *Websolv*, 580 F.3d at 551. In reaching this conclusion, the Court rejected Websolv's position that the policy's "separation of insureds" provision required the Court to evaluate the alleged property damage from the perspective of the company separately from the perspective of the insured. *Websolv*, 580 F.3d at 552. The Seventh Circuit noted that the "separation of insureds" clause did not help Websolv

because Gortho's complaint alleged that Websolv sent the fax and that Pabrai merely "authorized and approved" it. *Websolv*, 580 F.3d at 552.

SUMMARY OF ARGUMENT

Petitioner presents no "compelling reasons" to grant its Petition for Writ of *Certiorari*. Petitioner asserts that the Seventh Circuit's decision conflicts with the Eleventh Circuit in *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008), and involves questions of exceptional importance in that the approach of the Seventh Circuit violates this Court's holding in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and does so in a manner that has resulted in abuse and is likely to result in further abuse by insurance companies. These allegations plainly involve principles the settlement of which is inconsequential to the public and only important to the parties. Further, there is no embarrassing conflict of opinion and authority between the Seventh Circuit and Eleventh Circuit courts of appeal where the former exercised its sound discretion and denied certification of a question to the Iowa Supreme Court and the latter exercised its sound discretion and granted certification of a question to the Florida Supreme Court.[1] Moreover, the Seventh Circuit did not violate *Erie* or principles of federalism when it denied Petitioner's request to certify the question to the Iowa Supreme Court where certification is not mandatory, where the Seventh Circuit predicted how the Iowa Supreme Court would decide

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[1] The Florida Supreme Court issued its opinion on January 28, 2010. *Penzer v. Transportation Ins. Co.*, No. SC08-2068, slip op. (January 28, 2010).

the issue in the absence of Iowa precedent, and where the Opinion did not promote forum-shopping or an inequitable administration of the laws.

Petitioner also contends that the Seventh Circuit's Opinion will have long-reaching impact even though the coverage issues are limited to TCPA claims likely arising out of occurrences before 2005, when the insurance industry began issuing standard endorsements specifically excluding coverage for claims brought under the TCPA. The Seventh Circuit's Opinion is further restricted to TCPA coverage issues involving the application of Iowa law. Petitioner has not presented this Court with a compelling reason to invoke its *certiorari* powers and, as a result, the Petition should be denied.

REASONS FOR DENYING THE PETITION

I.

THE SEVENTH CIRCUIT'S REFUSAL TO CERTIFY THE QUESTION TO THE IOWA SUPREME COURT IS NOT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

Supreme Court Rule 10 (Sup. Ct. R. 10) sets forth the considerations governing review on *certiorari*. Rule 10 provides that "a petition for writ of *certiorari* will be granted only for compelling reasons," and that the decision to grant or deny review on writ of *certiorari* is within this Court's sound discretion. Sup. Ct. R. 10. While several factors indicate the character of the

reasons the Court considers, Petitioner seeks review on writ of *certiorari* under the following factor:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[.] Sup. Ct. R. 10(a).

As this Court has observed in the past,

> "it is very important that we be consistent in not granting the writ of *certiorari* except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

This case does not warrant review upon writ of *certiorari* because the Petitioner presents no unsettled principles of public importance, nor does there exist an

"embarrassing conflict of opinion and authority" between the Seventh Circuit and Eleventh Circuit courts of appeal. Instead, the unexceptional issue at hand is whether the Seventh Circuit should have granted Petitioner's request to certify to the Iowa Supreme Court the question whether TCPA claims trigger coverage under an insurance policy's "advertising injury" provision, where the Eleventh Circuit in *Penzer* granted certification of a similar issue. Certification allows a federal court faced with a novel state-law question to put the question directly to the State's highest court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). This Court has held that it is within the sound discretion of the federal court to grant or deny certification. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Thus, the Seventh Circuit decision not to grant Petitioner's request for certification is not a compelling reason for *certiorari* review where the question involves application of well-settled principles to a relatively familiar situation, *i.e.*, certification of a question to a state's highest court, and has little significance except for the parties. *See Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 189 (1973) (dissenting opinion).

Petitioner claims the issue is worthy of review upon *certiorari* because the Seventh Circuit violated this Court's holding in *Erie* by refusing to grant it certification. Petitioner's implication of *Erie* is merely a veiled attempt to bring significance to an inconsequential issue. For the reasons that follow, there is no *Erie* violation and this Court should deny the Petition.

A. The Seventh Circuit's Decision To Deny Certification To The Iowa Supreme Court Is Consistent With *Erie*.

In *Erie*, this Court held that there is no federal common law and that federal courts must apply the law of the State except in matters governed by the Federal Constitution or Acts of Congress. *Erie*, 304 U.S. at 78. *Erie* further held that: "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." *Erie*, 304 U.S. at 78. This Court has described the twin aims of *Erie* as (1) discouragement of forum-shopping and (2) avoidance of inequitable administration of the laws. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991), citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). In other words, " '*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court.' " *Chambers*, 501 U.S. at 53, quoting *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 706 (5th Cir. 1990).

The Seventh Circuit's decision to deny Petitioner's request for certification does not offend *Erie* for three reasons: (1) *Erie* does not mandate certification where state law is undecided; (2) the Seventh Circuit applied the law of the State by predicting how the Iowa Supreme Court would rule on the coverage issue where there was no controlling Iowa precedent; and (3) the Seventh Circuit's Opinion does not promote forum-shopping or

an inequitable administration of the laws due to the limited scope of the issues decided. The Seventh Circuit's refusal to grant certification is not a compelling reason for this Court to grant review upon writ of *certiorari* and the Petition should be denied.

1. Certification is not required under *Erie*.

The Seventh Circuit's refusal to certify the question to the Iowa Supreme Court did not violate *Erie* because *Erie* does not require that a federal court must grant a party's request to certify a question to a state's highest court. Rather, *Erie* provides that a federal court must apply the law of the State, unless the matter is governed by the federal constitution or congressional acts. There is nothing in *Erie* to suggest that where the law of the State is unclear, a federal court must grant certification of the issue to the state's highest court. To the contrary, this Court has made the following observations with respect to the certification procedure:

> "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court." *Lehman Bros.*, 416 U.S. at 390-91.

Petitioner perceives a current trend that federal District Courts and Circuit Courts of Appeal have been increasingly relying on certification to ascertain

uncertain state law, but it critically fails to demonstrate that the Seventh Circuit violated *Erie* by exercising its sound discretion to deny certification *in this case.*

Notably, the Seventh Circuit did not abuse its discretion when it denied Petitioner's request for certification. The Seventh Circuit grants certification only when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to decide the issue. *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001); *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998). Here, the Seventh Circuit determined that the coverage question at issue was not worthy of certification because it was "hardly one of vital public concern. Furthermore, the issue is not likely to recur." *Websolv*, 580 F.3d at 549, n3. It is without question that the issue whether an advertising-injury provision in a CGL policy covers TCPA claims is neither compelling nor a matter of "vital public concern." *Cf. Plastics Engineering Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 661 (7th Cir. 2008) (holding what constitutes an "occurrence" in an insurance contract when exposure injuries are sustained by numerous individuals at varying geographical locations over many years was a question of vital public concern). Similarly, the issue is not likely to recur given the fact that in 2005, the insurance industry began issuing a standard endorsement specifically excluding coverage for TCPA claims. *Websolv*, 580 F.3d at 549, n3.

2. *Erie* allows a federal court to predict state law where the issue is undecided in that state.

The Seventh Circuit adhered to the rule promulgated in *Erie* by predicting how the Iowa Supreme Court would rule on the "advertising-injury" coverage issue absent Iowa precedent. Although this Court has not expressly stated that *Erie* allows federal courts to predict how the state's highest court would rule when there is no controlling state law, it implied as much in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (U.S. 1940), which held that "[s]tate law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule[.]" Furthermore, the vast majority of federal Circuit Courts of Appeal follow the principle that *Erie* contemplates in some instances, federal courts will be required to decide unsettled issues of state law. *See Kunelius v. Town of Stow*, 588 F.3d 1, 9 (1st Cir. 2009) ("Where no authoritative decision from the state court of last resort resolves an issue of state substantive law, we must predict, as best as we can, that court's resolution of the issue before us"); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273 (2d Cir. 1994) (same); *Jewelcor Inc. v. Karfunkel*, 517 F.3d 672, 676 (3d Cir. 2008) (holding in diversity cases, where the applicable rule of decision is the state law, it is the duty of the federal court to ascertain and apply that law, even though it has not been expounded by the highest court of the state); *Burris Chem. v. USX Corp.*, 10 F.3d 243, 248 (4th Cir. 1993) (If there is no decision by the high court which is directly on point, "then we

must * * * predict how the high court would rule"); *Northrop Grumman Ship Sys. v. Ministry of Def.*, 575 F.3d 491, 501 (5th Cir. 2009) ("Exercising our duty under *Erie*, we predict that the Supreme Court of Mississippi would afford this same privilege to foreign sovereigns"); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001) ("If the state supreme court has not yet addressed the issue presented, this Court must predict how it would rule"); *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 635 (7th Cir. 2002)

> "If the mandate of *Erie* is to be satisfied and the law ultimately employed is to be the law of the state, the federal court, exercising its authority to hear diversity cases, must make a predictive judgment as to how the supreme court of the state would decide the matter if it were presented presently to that tribunal";

United Fire & Cas. Ins. Co. v. Fenton, L.L.C., 328 F.3d 411, 413 (8th Cir. 2003) ("When a state's highest court has not decided an issue, it is the task of this court to predict how the state supreme court would resolve the issue"); *Aetna Casualty & Sur. Co. v. L. K. Comstock & Co.*, 684 F.2d 1267, 1275 (9th Cir. 1982) ("Where the applicable state law is unresolved, * * * this court has a duty to 'use its own best judgment in predicting how the state's highest court would decide the case' (quoting *Takahashi v. Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir. 1980)); *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003) ("Where no controlling state decision exists, the federal court must attempt to predict what the state's highest court would do"); *Smigiel v. Aetna Casualty & Surety Co.*, 785 F.2d 922,

924-25 (11th Cir.1986) ("although we are *Erie* bound, we may exercise an option to make an educated guess as to how the [state] courts would resolve this issue").

In this case, the Seventh Circuit predicted how the Iowa Supreme Court would decide the advertising-injury issue because there was no controlling Iowa authority. Without the aid of Iowa law, the Seventh Circuit relied, in part, on *American States*, which held that under Illinois law, an advertising-injury provision did not cover TCPA claims because: it was unlikely that the "right to privacy" provision in a corporate insurance policy was meant to cover seclusion interests; and the use of the word "publication" made it more probable that the provision only covered claims involving secrecy interests. *Websolv*, 580 F.3d at 550. Even though the Illinois Supreme Court later disagreed with the Seventh Circuit's analysis in *American States* (*See Valley Forge*, 860 N.E.2d at 668-69 (holding under Illinois law, the term "publication" did not narrow the scope of "privacy rights")), the Seventh Circuit concluded that "Iowa [wa]s more likely to adopt [its] interpretation rather than the one adopted by the Illinois Supreme Court [in *Valley Forge*]." *Websolv*, 580 F.3d at 550. In coming to this conclusion, the Seventh Circuit reasoned that because Iowa refers to closely related or associated policy language to illuminate the meaning of insurance coverage provisions, the use of the word "publication" in the advertising-injury provision narrowed the scope of the "privacy rights" referred to in the same clause. *Websolv*, 580 F.3d at 550, citing *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994). There is no question that the Seventh Circuit followed *Erie* by predicting how the Iowa Supreme Court would decide the advertising-injury issue.

Petitioner asserts that the Seventh Circuit created and imposed its own general common law by looking back to its decision in *American States*, which was not a correct prediction of Illinois law. Petitioner further contends that the Circuit Court reached its conclusion not by analyzing Iowa law, but by restating its own view of what the outcome should be and reiterating its "incorrect prognostication of Illinois law." Petitioner also claims that the Seventh Circuit should have found a duty to defend because Iowa and Illinois use almost identical methods to interpret insurance policies and Iowa is more pro-insured than Illinois. Petitioner's assertions are misguided.

Contrary to Petitioner's contention, the Seventh Circuit clearly analyzed the undecided coverage issue under Iowa law, not a general common law. Petitioner even admits that the Seventh Circuit "relied on *one* Iowa decision for the proposition that 'Iowa also refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions.' *Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994)." (Emphasis in original). The Seventh Circuit's reliance on *American States* and only *one* Iowa case does not reveal a propensity for a general common law but, instead, demonstrates the undisputed lack of Iowa precedent on the issue. As explained by this Court in *West*, "it is the duty of the [federal court] * * * to ascertain *from all the available data* what the state law is and apply it rather than to prescribe a different rule[.]" (Emphasis added.) *West*, 311 U.S. at 237. That is precisely what the Seventh Circuit did in this case. Last, whether the Seventh Circuit appropriately decided the coverage issue under

Iowa law cannot be put before the clear language in the Opinion indicating that the Seventh Circuit abided by *Erie* and applied what it predicted to be the law in Iowa. Petitioner's contentions that the Seventh Circuit violated *Erie* by creating and imposing its own common law are not compelling.

3. The Seventh Circuit's Opinion did not promote forum-shopping or an inequitable administration of the laws.

This Court accomplished the two goals of *Erie* – discouragement of forum-shopping and avoidance of inequitable administration of the laws – by requiring uniformity between "coordinate state and federal courts sitting side by side." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Here, in the absence of Iowa precedent, the Seventh Circuit followed this Court's direction and coordinated with the Iowa state court by predicting that the Iowa Supreme Court would conclude that an advertising-injury provision does not cover claims brought under the TCPA. Petitioner nonetheless claims:

> "The Seventh Circuit, by finding that there is no relevant Iowa law and then setting forth its own law, has effectively prevented Iowa from deciding the issue and invited insurers to continue to file these types of cases in federal forums in order to gain the advantage of such precedent and has accomplished just what this Court has long sought to curtail."

Petitioner's theory lacks merit in the face of *Valley Forge*, where the Illinois Supreme Court abrogated *American States* and held that the Seventh Circuit did not accurately predict the advertising-injury issue under Illinois law. So too here. If the Iowa Supreme Court finds fault with the Seventh Circuit's Opinion, it can issue its own opinion abrogating *Websolv*; however, if the Iowa Supreme Court finds no fault with the Seventh Circuit's Opinion, it may do nothing, thereby guaranteeing a litigant that if he takes his state law cause of action to federal court in the Seventh Circuit, the result in his case will be the same as if he had brought it in Iowa. *See Chambers*, 501 U.S. at 53.

Regardless, any potential problem with forum-shopping in this case is limited by the narrowness of the issue, *i.e.*, whether, under Iowa law, an advertising-injury provision covers claims brought under the TCPA. Petitioner suggests that insurers "can create diversity at will," and that they are manipulating jurisdiction in order to take advantage of the Seventh Circuit's "general common law." Insurers do not "manipulate" jurisdiction, and they have little control over the substantive law applied by the federal court. *See Klaxon*, 313 U.S. at 496 (a federal court sitting in diversity must apply the choice-of-law rules of the forum state to determine which state's substantive law applies). Simply put, the forum-shopping issue raised by Petitioner is limited solely to insurance coverage disputes governed by Iowa law which involve claims brought under the TCPA. Not only is the state substantive law a limiting factor, so too is the endorsement excluding coverage for TCPA claims which insurers began inserting into insurance policies in 2005. Accordingly, the opportunity for insurers to "misuse

diversity jurisdiction" to obtain a more favorable forum in the Seventh Circuit is small, and therefore, forum-shopping is not a compelling reason that this Court should grant the Petition.

In the light of the foregoing, the Seventh Circuit's decision to deny Petitioner's request for certification to the Iowa Supreme Court did not offend this Court's decision in *Erie*. This Court should deny the Petition for Writ of *Certiorari* for failure to present a compelling reason to grant review upon *certiorari*.

II.

THE PURPORTED LONG-REACHING IMPACT OF THE SEVENTH CIRCUIT'S PREDICTIONS OF IOWA LAW IS NOT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

As previously explained, the impact of the Seventh Circuit's predictions of Iowa law is not long-reaching, but limited. The Seventh Circuit's Opinion only applies to coverage actions filed in the Seventh Circuit where the TCPA coverage question concerns the application of Iowa law. Petitioner confuses the issue by asserting that the Seventh Circuit's Opinion will impact the question whether in interpreting insurance policy provisions such as the advertising-injury clause, the reader is charged with technical, legal understanding. Petitioner's contention is not only incorrect and unsubstantiated, but also is contradicted by its later statement that the Seventh Circuit failed to "answer the key question of whether the reader of the associated policy language is assumed to understand technical legal concepts such as intrusion or seclusion."

In addition, Petitioner mistakenly claims that "another state issue likely to recur (completely distinct from coverage under 'advertising injury') is whether the separation of insureds clause requires a defense under the property damage coverage for such claim." This issue, like the advertising-injury issue, is tied to TCPA coverage disputes governed by Iowa law, and therefore, it is unlikely to recur. More importantly, the Seventh Circuit did not "wade[ ] into important issues of state law and policy," as urged by Petitioner, but instead, merely applied the plain language of the insurance policy's expected and intended damage exclusion to the allegations of the underlying complaint. *Websolv*, 580 F.3d at 551-52. In doing so, the Seventh Circuit observed that the separation of insureds clause was unhelpful to Petitioner because the underlying complaint alleged that Websolv sent the fax and that its employee Pabrai only "authorized and approved" it. *Websolv*, 580 F.3d at 552. Because the Seventh Circuit's analysis of the separation of insureds clause depended entirely on the specific facts alleged in the underlying complaint, there is no question that the issue has little significance except to the parties.

Accordingly, Petitioner has not presented a compelling reason for this Court to grant the Petition for Writ of *Certiorari* where the Seventh's Circuit's "predictions" of Iowa law will have limited impact.

CONCLUSION

For the foregoing reasons, the Petitioner has failed to establish any compelling reason for this Court to grant review upon writ of *certiorari*. Respondent respectfully requests this Court to deny the Petition.

Respectfully submitted,

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